

REMARKS

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EVENT: Association of American Law Schools Annual Luncheon
WHEN: 12:30 p.m., Friday, January 4, 2001
WHERE: Grand Ballroom Hilton New Orleans Riverside
TOPIC: The Hybrid University and Law Schools

Dean Mary Kay Kane (Hastings School of Law) introduces President Yudof.

Thank you, Mary Kay. People do ask me what it's like being in Minnesota, and dealing with our rather unorthodox Governor, and I tell them: Well, he is a hard man to pin down, but we see eye-to-eye on many issues...as long as I'm standing on a chair.

I'm glad to be here with my colleagues today. Effective university presidents can come from virtually any discipline, from nuclear physics to the performing arts. I do have to say, however, that my own legal education and experience as a law professor and dean have served me well in my current role as President. For one thing, there are always a couple of hundred law suits against the university and me on any given day—a little like the ever-present alien space ships in the film *Men in Black*, threatening the complete destruction of the planet unless their demands are met in twenty-four hours. For another, in the modern world presidents do not have hierarchical authority any more than modern public school superintendents do; they must control their totalitarian tendencies if they are to survive. The role of the modern university president, like that of a law school dean, is akin to being manager of a cemetery: there are many people under you but no one is listening!

And I suppose it is my legal background that inclines me toward the idea of compacts between central administration and academic units. In lieu of long range plans gathering dust on the shelf, I prefer annual agreements between the university's constituent parts and its center. I like the specificity, the articulation and integration of goals, the use of benchmarks, and the sense of mutual obligation. At Minnesota, my philosophy is a mix of Lon Fuller, Corbin, and Michael Corleone.

My theme today focuses less on internal university governance and more on the changing political and fiscal context in which public research universities—and their law schools—are embedded. I first spoke about this general theme at an April symposium called "The Changing World of University Leadership and Governance," which was held in honor of Clark Kerr, the former president of the University of California System.

Since then my thinking has evolved somewhat, but my central assertion remains the same:

In order to adapt to the uncontestable fact that state funds make up a smaller portion of their budgets and that such funds comprise a decreasing slice of the state budget pie, public research universities will look to students to pay a greater and greater portion of the cost of their education. The students' share of their instructional cost has virtually doubled over the last 20 years at many large public universities, including my own University of Minnesota.

None of this is much of a surprise to my peers from the public institutions represented here today, but there is more: the historic covenant between the states and their flagship public universities has withered for the past 25 years—at best it is on life-support. If higher education leaders pretend otherwise, yielding to a convenient but false optimism, their institutions will decline as great centers of learning and research. In the jargon, someone has moved the cheese—and wishing will not bring it back.

And what was that compact? In return for substantial financial support from taxpayers, these public universities would keep tuition low and provide broad access for undergraduates from all economic strata; train graduate and professional students; promote arts and culture; help solve local problems; and perform ground-breaking research. Public law schools were major players in this effort: one need only think of the splendid legal education offered at such institutions as Berkeley, Michigan, Virginia, Texas, Wisconsin, Washington, Minnesota, and many others.

To be sure, the massive tuition increases (7.7% at publics, more than twice CPI inflation) we've seen this year may in part be driven by depleted state coffers (43 states are facing revenue shortfalls), but they also represent a deepening of a long-term pre-existing trend. State support for higher education per \$1,000 in personal income dropped from \$11.22 to \$7.94--a 30 percent decline--from 1979 to 2000. Public law schools are affected by this trend and have also been raising tuition: an average of 9.3% each year for in-state students over the last decade or more than doubling from \$3,591 to \$7,790 from 1991-2000. That compares to a 6.4% annual increase at the privates, from \$12,738 to \$21,790.

I should note that state support for public research universities from their respective states has generally kept pace with inflation as measured by the CPI; but since universities have faced much higher cost increases due to their labor and technology intensity, this a recipe for falling behind. This is true at our law schools, where the biggest ticket items are faculty salaries,

technology, clinical education, and libraries. Equally as important, excellence is measured in both absolute and relative terms, and the competition to achieve it is intense and expensive,

This competition among higher education institutions occurs within the public sector, but private universities are a major factor. Even adjusted for inflation, the wage gap between what full professors at private Carnegie Research Universities I and their public counterparts has grown from \$1,400 in 1980 to \$22,100 today. As many deans and faculty members here today are aware, law schools have not been immune to this widening public/private compensation disparity.

So what's driving this trend? Demography plays no small role: The number of Americans between the ages of 45 and 65 grew by a third over the last decade. The portion of U.S. households with children at home has dropped from half to a third between 1960 and the present. (Are the people now watching their stock portfolio instead of raising kids? Fifty percent of the population owns stock today, a five-fold increase over 1965.)

As a result, the attention of an aging public has shifted toward services that it perceives as more directly affecting their welfare: mainly health care and public safety, and away from education and social services. State spending on higher education fell 14 percent from 1986 to 1996 as a share of states' total budgets. Medicaid's share nearly doubled over the same period, and corrections' share increased by more than 25 percent. In fact, the downward curve of state spending for higher education intersected with the steep incline in Medicaid's curve right around 1990.

Another factor, ironically, is the increasing value of education to individual students. The difference between the wages of the college educated and the non-college educated, once only a few thousand dollars annually, has widened considerably since the early 1970s. A college graduate today will earn an average of \$1 million more than a high school graduate over his or her lifetime. Those with professional degrees, including graduates with law and MBA degrees, increase the gap on average to \$3 million. Thus higher education today is increasingly seen as more of a mixed private/public good—with the emphasis distinctly on the private returns. Where students face financial difficulties, policymakers generally favor direct aid and tax breaks to families or, tacitly, more borrowing. In the absence of increased state or federal aid directly to institutions, they can recapture their costs only through increased tuition.

Relatedly, many legislators and governors subscribe to market accountability over traditional legislative “good government” oversight. The idea is you're

doing the right thing as a university if you are attracting students because of your quality, reputation, and service to students. This emerging paradigm relies on higher user fees (tuition), competition for students (with the market insuring quality), and the availability of financial aid and targeted tax breaks roughly equivalent to income-adjusted vouchers.

I foresee a number of challenges to the hybrid university.

The first challenge is for education leaders to convince students, lawmakers, governing boards, and the public that higher-quality public research universities (and law schools) are better than financially-pressed ones without a substantial research capacity. Much may depend on who makes the tuition decisions in a particular state, for populism and market ideology may happily, if inconsistently, co-exist in decision-making bodies. It is also a golden rule of politics that people want to receive more and pay less.

The second challenge, with tuition rising, is to maintain broad student access, including historically under-represented groups, through student aid and scholarships. Public and private financial aid will become more critical than ever. For law schools, high levels of student debt may propel graduates away from public service careers.

The third challenge is to retain the existing level of state subsidy. Even under the new model, education still has enormous public benefits, and advocates will have to find more ways to demonstrate what they are. Otherwise, tuition increases may be matched, in real dollar terms, by reductions in state aid.

The fourth challenge is to provide for community outreach in an increasingly tuition-dependent environment. Community involvement that doesn't directly relate to student education is problematic to finance in the hybrid university, unless tuition dollars are used. Law should be okay on this. For example, law school clinics provide a vital public service and a splendid learning experience. A major cost for public law schools is libraries—they should be seen not only as a benefit for the institution's scholars, but also as a public good. Even as more and more resources are online, in places like Minnesota and Iowa, law school libraries provide the authoritative research collections that attorneys in the region rely upon.

The hybrid public law school arises at an inauspicious time.

Law schools, true to the Langdellian model, traditionally offered large classes and maintained a much higher student/faculty ratio than other graduate and professional schools, e.g., medicine. But virtually every curricular reform of the last three decades has involved smaller grouping of students, whether in

clinics, intensive writing classes, interdisciplinary seminars, or skills training in trial advocacy and alternative dispute resolution. These curricular reforms are genuinely worthy of praise, but they also are far more expensive than the traditional contracts class, with one professor and 125 students.

Under the traditional model, law schools sought to stave off attempts by foolhardy presidents and provosts to cross-subsidize the rest of the institution with law school tuition dollars. Private law schools have much experience in this arena. The motto was that law schools could take care of themselves if grasping central administrators would leave them alone. Now inflation-adjusted tuition levels at public law schools may no longer be sufficient to pay the bills, and the bills are high, often including running a more-or-less autonomous institution with its own career counseling, admissions, registration, and financial aid offices. Public research universities often support schools of medicine, veterinary medicine, dentistry, and the like, and such schools are incapable of sustaining themselves with tuition alone. Demography demands that they be placed at the head of the list for subsidies. Whether we agree or not, law schools, like business schools, are perceived as weighted more to the private good side of the mixed public/private good philosophy that drives the modern hybrid university. It is no accident that there is no federal agency akin to the NIH for sponsoring legal research.

Importantly, if I am right, public law schools will lose a significant part of their price advantage over private law schools, and they will have to learn to compete more effectively with the private schools. They will need to improve their internal efficiency, quality, and marketing to compete in a heated-up post-secondary market.

For example, public law schools themselves cross-subsidize within the school, and, though it will be painful, they will be compelled to methodically look at whether programs involving such things as small first-year sections, reduced teaching loads for professors, and extensive seminar offerings can "self-support" through tuition dollars; the rationale and educational justification for cross-subsidies will be more critically examined and the decisions more purposeful.

My biggest concern is that with all the talk of markets, pricing mechanisms, tuition, and efficiency that something essential will be lost: law schools have a continuing obligation to nurture and preserve learning for its own sake, to be responsible for cultural transmission, to encourage civic virtue and understanding, to promote justice and civic engagement, to explore the intersections of law and public policy, and to advance research and other less quantifiable (but still valuable) goals. As we know from the history of many of

our great private law schools, markets are not necessarily antithetical to these aspirations, but I do worry.

And the idea of the autonomous law school, competing only against other law schools as isolated entities, may make some sense in a financial sense, but it is ludicrous from the standpoint of knowledge and learning. Law schools benefit immensely from being a part of large, comprehensive universities; law is both a discipline and a profession. It is a way of seeing the world, but it is not the only way. The 21st century is witnessing, as the eminent biologist E.O. Wilson predicted, a reintegration of knowledge; psychology is not so far from neuroscience as many had supposed, the genome of the round worm yields great insight into the human genome, the methods of sociology and philosophy take root in many parts of the university. And law is no exception. One need only think of the work of Cass Sunstein and others in the emerging field of behavioral economics and law or the rich scholarship on law and literature.

And now, having said we must re-examine some of the more important law school reforms of the past quarter century in light of the current funding environment, I would like to propose one for which I do not know the financial implications. It may be unthinkable in the new political and fiscal environment. My own view is that the efforts at interdisciplinary engagement by law schools have often been feeble, too often undertaken only on terms and turf acceptable to the law school. The standard fare is that the law faculty grudgingly gives up a semester's worth of courses, the cooperating school or college does the same, and the student receives two advanced degrees, one in law and one in the other field, saving a year of study. A non-law professional or graduate student, who does not want a full-fledged law degree but believes that legal studies are essential to his or her overall academic program, can take only individual courses at the law school and only with the sufferance of individual professors.

This rigid degree structure is hardly inevitable. I can imagine law schools offering Master of Legal Affairs degrees, as an alternative choice to the traditional J.D., for those who are not seeking to enter the legal profession but who wish to enhance their understanding of legal matters for careers in government, business, philanthropy, education administration, and public policy. Such programs would, I believe, also promote a revitalized liberal education, broaden access to law studies, help reintegrate law schools into universities, and expand the interdisciplinary possibilities.

But I digress. My main point here today is that for decades, most public research universities and their supporters have written off their funding predicament to the circumstances of the day--if only the economy were better, if only this candidate had won an election rather than that one, if only a

certain legislator chaired the higher education committee, if only they had done a better job of explaining their university's importance to the state's economy and society during the legislative session. One can and should always try harder. But repeating the same behavior over and over and expecting a different outcome just doesn't make sense. Some would call it neurotic! While state funding will continue to make up an important, unrestricted slice of public research universities' budgets, I do not see it growing to meet their needs anytime soon. And the public purposes that Legislators may more and more explicitly earmark funds for are not likely to include legal education.

It's time we adjusted to the long-term political realities and do what we need to do to keep public research universities and their law schools operating at the highest levels of excellence and fulfilling their historic mission.

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